Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

NO. 77-210

In the Matter of the Application of
County of Nassau Acquiring Property
for the Mill Neck Conservation of
the Area of Open Space and Excess
Lands, Incorporated Village of
Bayville, Town of Oyster Bay,
Nassau County, New York

THE COUNTY OF NASSAU,

Appellee,

-against-

EVEANDRA ENTERPRISES, INC.,

Appellant.

On Appeal from the Court of Appeals
of the State of New York

APPELLANT'S BRIEF IN OPPOSITION TO APPELLEE'S MOTION TO DISMISS OR AFFIRM

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THE COUNTY OF NASSAU,

Appellee,

-against-

EVEANDRA ENTERPRISES, INC.,

Appellant.

APPELLANT'S BRIEF IN OPPOSITION TO APPELLEE'S MOTION TO DISMISS OR AFFIRM

ARGUMENT

Appellee's motion to dismiss or affirm fails to state any grounds or give any reasons why this Court should not set this case for argument. It advances an untenable argument not supported by any authority, and misstates the holdings of the courts in the cases cited.

I

Appellee raises a most ingenious argument at page 5. It argues that §3-a (2) of the General Municipal Law in which the State Legislature fixed the maximum rate of interest to be paid on a condemnation award, must be presumed valid and constitutional; that in the judicial process appellant had the burden of proving that the rate of interest fixed by the legislature is unreasonable and violative of substantive due process of law, and that appellant did not meet that burden nor overcome the presumption of constitutionality and the proper legislative purpose of that statute.

By appellee's theory there is then cast on appellant a greater burden than the ordinary preponderance of the evidence, such as the additional burden of proving the unreasonableness of the statutory rate of interest, the burden of overcoming the presumption of constitutionality and to submit proof that the statute did not involve a proper legislative purpose. It adopts a position that the legislature has the right to

intrude upon the judicial function of the determination of just compensation by imposing upon a condemnee a larger burden of proof in the determination of just compensation. It presupposes that the legislative rate is fair and reasonable. If appellee's argument is valid then the legislature, we assume, would be empowered to provide for other presumptions of just compensation, such as the assessed valuation of property fixed by a municipality, value as depreciated in a federal tax return, the condemnor's appraised value and a myriad of other possibilities. This is the thrust of this entire case. The Courts below have in effect done what appellee now argues they may do of right. If the decision below stands it will open a pandora's box of these other possibilities and profoundly change existing law.

Interest on a condemnation award is not granted by legislative grace as in various other types of litigation and judgments, where no common-law or constitutional right to interest exist. *45 Am. Jur. 2d, Interest and Usury* §59; *Purcell v. L.I. Daily Press Pub. Co.* 9 N.Y.2d 255 (1961), contra. *Rochester Carting Co. v. Levitt* 36 N.Y.2d, 264 (1915). It is constitutionally mandated as a part of just compensation. The rate of interest is a question of fact judicially determined by the weight of the evidence. *U.S. v. Blankinship*, 543 F2d 1272 (9th Cir 1976). In the instant case appellee submitted no contrary evidence to that of appellant at the trial. In fact it virtually conceded that the opinion and statements of appellant's witness as to the proper rate of

interest, was fair (A-129, 130).[1]

As stated in appellant's Jurisdictional Statement (p. 13), it is only where there is an absence of proof of a proper rate of interest, that courts have accepted as presumptively fair the rate of interest fixed by statute. *Bronx River Parkway* 259 A.D. 522, (1940) aff'd 284 N.Y. 48 (1940).

II

The decision by the Fifth Circuit in *U.S. v. Baugh et al*, 149 F2d 190 (1945) cited by appellee at page 5, follows the settled law that interest is a part of just compensation and that its determination is solely a judicial function. The issue in that case was whether any interest at all was allowable on the sum agreed to be paid for the taking in a condemnation proceeding. Appellee at page 6 eroneously cites this case for the proposition that where, as in the in the instant case, there is a "presumptively valid statutory interest rate, the judicial function is narrowed to that of a review of its reasonableless".

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[1] A-129, 130 refers to pages in appellant's appendix in the New York Court of Appeals, transmitted to this Court as part of the original record.

III

While *Monogahela Navigation Co. v. U.S.*, 148 U.S. 312 (1893) and *U.S. v. Commodities Corp.*, 339 U.S. 124 (1950), do not, as stated by appellee at page 6, "deal specifically with the issue of interest in a condemnation award proceeding" they do hold, as stated in *Monogahela* (p.327), that "It does not rest with the legislature .... to say what compensation shall be paid, or even what should be the rule of compensation".

IV

Appellee at page 7 incorrectly states that in *Lincoln Square Slum Clearance Project* 15 A.D.2d 153 "claimant submitted evidence that a higher rate of interest would be factually the fair rate of interest .....". There was no evidence of a proper rate of interest adduced at the trial. As stated by the Court in that case (p.181) an "affidavit of counsel (was submitted) stating that 6% per annum is factually the fair rate of interest for use of money in the money market in New York City .....".

V

It is inaccurate for appellee to state (p.3) that appellant offered testimony showing that prime rates of interest between 1969-1970 ranged from 8-1/2% to 8%. The testimony was that during the 5-1/2 year period of delay in payment, prime rates to most favored borrowers were

in the range of 4-3/4% to 12% (A-137); that the rate of interest on most loans from banks was not 12%, but that the "true" rate was 16.15% (A-71,72,74), and that 12% was the average rate over the 66 month period. (A-120). It was, for the reasons as held in *Blankinship*, supra, referred to by appellee (p.8), that interest rates applicable to a Municipal, State or Federal government may well be lower, that a medium between the average borrowing cost of 12% and the County's return on short time investments of 7.5% or 9.74% was testified to as being the fair rate of interest applicable to the County of Nassau (A-127-129). This rate of 9.75% reflected a reasonable balance between return and safety - a "median" which was held to be the proper rate in *Lincoln Square Slum Clearance*, 15 A.D.2d 153, 178-180 (1961), aff'd 16 N.Y.2d 497 (1965), and in *Manhattan Civic Center Area*, 57 Misc.2d 156 (1968), aff'd 32 A.D.2d 530 (1969), aff'd 27 N.Y.2d 518 (1970).

Respectfully submitted,

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